ORIGINAL

No. 91-5473

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

BRETT PATRICK PENSINGER,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the California Supreme Court violate the Eighth Amendment when, after reversing the torture special circumstance, it upheld the sentence of death without reweighing the surviving special circumstance or conducting a harmless error analysis?

2. Whether the California Supreme Court adequately reweighed the single surviving aggravating factor against the three mitigating factors.

3. Whether the California Supreme Court made use of evidence of sexual offenses of which the petitioner had been acquitted, thereby violating principles of collateral estoppel protected by the double jeopardy clause of the Fifth and Fourteenth Amendments?

4. Did the California Supreme Court's reference to sexual acts implicate the Fifth and Eighth Amendments as barring such a reference?

5. Whether the informant's testimony was such as to involve the use of perjury and deny petitioner a fair trial?

6. Did the California Supreme Court apply the proper harmless error test in assessing the use of the informant's testimony?

7. Whether the failure to reveal the South Carolina investigative report was material evidence such that its being withheld constituted a violation of the due process clause of the Fifth Amendment.

LIST OF PARTIES

Petitioner, Brett Patrick Pensinger, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent is the People of the State of California.

OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming his judgment of death. (People v. Pensinger, 52 Cal.3d 1210 (1991).)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. section 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth, Eighth and Fourteenth Amendments

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STATEMENT OF THE CASE

In a five-count information filed by the District Attorney of San Bernardino County on December 18, 1981, petitioner was charged in count one with murder (Cal. Pen. Code, § 187) to which four special circumstances were alleged: (1) that the murder was committed while appellant was engaged in kidnapping in violation of California Penal Code section 207; (2) that the murder was intentional and involved the infliction of torture; (3) that the murder was committed during the commission or attempted commission of a lewd and lascivious act upon a child under 14 in violation of California Penal Code section 288 subdivision (a); and (4) that the murder was committed during the commission or attempted commission of an act of oral copulation in violation of California Penal Code section 288a subdivision (c).

Counts two through five charged petitioner with two counts of kidnapping (Cal. Pen. Code, § 207) and one count each of a lewd and lascivious act upon a child under 14 (Cal. Pen. Code, § 288, subd. (a)) and oral copulation (Cal. Pen. Code, § 288a, subd, (c)). (CT 708-712.)

During trial, on July 12, 1982, a defense motion was made challenging the competency of Michael Melander, Jr., after which the trial court, pursuant to California Evidence Code sections 4-5, 701, and 703, ruled the witness had personal knowledge, the capacity to communicate, and was able to understand the duty to tell the truth. (CT 912-913.)

On July 19, 1982, the court heard and overruled defense counsel's objection to Gary Howard's testimony regarding petitioner's statements to Howard of sexual mutilation. (CT 946.)

On August 3, 1982, after less than two-and-one-half days of deliberations, jury verdicts were returned finding appellant guilty of murder in the first degree. Special circumstances one (kidnapping) an two (torture) were found true, while three and four were not. Petitioner was found guilty of two counts of kidnapping and not guilty of counts four and five. (See, CT 998-1000, 1101-1109, 1191-1199.)

After the presentation of evidence on August 11, 1982, after less than one day of deliberations, a jury verdict was returned setting forth the penalty to be imposed on petitioner as death. (CT 1232, 1241.)

On September 20, 1982, petitioner's motion for modification of the verdict was heard and denied, with the trial court making specific findings. (CT 1514-1517.) The death penalty for count one was thereafter imposed. The mid term of five years as to counts two and three was imposed, and ordered to run concurrent with count one. Execution of sentence as to count two was stayed until completion of the sentence in count three. (CT 1517.)

Upon automatic appeal to the California Supreme Court, the special circumstance of torture-murder was reversed, but the

judgment and penalty of death were affirmed in all other respects. (People v. Pensinger, 52 Cal.3d 1210 (1991).)

STATEMENT OF FACTS

The statement of facts is taken from the California Supreme Court's opinion in People v. Pensinger, supra, at pp. 1229-1236.)

"On July 31, 1981, defendant left his Orange County, California home and went on an errand in his uncle Thomas Meyer's pickup truck from which he never returned. On August 4, 1981, defendant turned up in Parker, Arizona. He went to the Silver Saddle bar in midafternoon, and met Vickie and Michael Melander, who have been drinking since noon. Defendant introduced himself as Panama Red, and said his real name was Don Donovan. He drank and played pool with the Melanders. At about 7 p.m., Vickie said she had to go check on her children who were staying with a fried. Defendant drove her to the Williams home, and Vickie introduced defendant as Panama. Defendant and Vickie put Michael, Jr., five, and Michelle, five months, into the truck with them and drove off, around 7:40 p.m.. They drove about 10 minutes, then stopped at the Turtle Barn bar in Parker. Vickie and defendant went in for a beer, leaving the children unattended in the truck. While they were inside, Michael, Jr., found defendant's rifle and pointed it at a man in the Turtle Barn parking lot,

who confiscated it. When Vickie came out to check on the children, Michael, Jr., told her that a man had stolen Panama's gun. She told defendant, and she said he became enraged, so much so that she became afraid of him and ran off down the street. Vickie said defendant drove after her and persuaded her to get back in the truck. They went to the Silver Saddle, where Vickie again left the children unattended in the truck, and reported to her husband that defendant and she were going to the sheriff's substation to report the theft of the gun. Defendant apparently had a beer while the Melanders talked. Some witnesses said the Melanders argued; none reported that defendant acted violent or angry.

"Vickie and defendant, still with the children in the truck, arrived at the sheriff's substation about 8:20 p.m. She reported the theft; the sheriffs said it was a local police matter, and called the Parker police for her. She looked out and noticed that the truck was gone, but was not concerned, assuming that defendant was either looking for his gun or was back at the Silver Saddle. When the local police arrived, she reported that her own gun had been stolen; then, when she was unable to describe the weapon, she admitted that it was actually someone else's gun. The police drover her back to the Silver Saddle about 9 o'clock.

When she realized that her children were still unaccounted for, she became concerned.

"A customer and an employee of the PDQ market in Parker testified that a tall young man in a cowboy hat came into the store sometime after 8 o'clock on August 4, looking for someone who had stolen a rifle out of his truck when his wife and five-year-old child were in it. He was beside himself with rage, and said that if the person who stole the gun came in and tried to use it in a robbery of the store, they had his permission to grab the gun and 'blow their head off.' The store employee saw the man into a light blue pickup and drive off. The employee saw no one else in the truck.

"Michael, Jr., confirmed that the man he knew as Panama came with his mother to pick him and his sister up at the Williams house, that they all drove off in the man's light blue pickup, that they stopped at the Turtle Barn, that his mother and Panama went in, that he pointed Panama's rifle at a man in the parking lot, that the man took the gun, that when his mother told Panama this, Panama 'hit the wall' and his mother ran off, that Panama got his mother to get back in the truck, and that they went to the sheriff's substation where his mother went in. Michael, Jr., said that Panama drove off, and when they get near the Parker Dam, Panama said that there was a cop following him and

that Michael, Jr., should get out and wait until Panama came back for him. The boy did. After a while he started to hitchhike. He did not recall stopping at the PDQ market, and he did not see Panama hit his sister in the truck. He misidentified a photo of another man as Panama, was unable to identify defendant, but did identify a picture of defendant's truck. He said Panama did not hit him, and that Michelle was crying as Panama drove off. He was certain that it was the same man who picked him up at the Williams home, who drove off with him and his sister and left him by Parker Dam.

"A couple picked Michael, Jr. up about 9:30 p.m. near the Parker Dam, on the California side of the dam, He did not seem upset, but said that a man whose name he did not know had his little sister and had driven off with her in his pickup. They called the sheriff, and waited in a restaurant. When the sheriff came in, the couple said the boy's first words were, 'Where's Panama?' Michael, Jr., told the sheriff that Panama had taken him and Michelle from in front of the substation, that Panama had taken him to his trailer and that Panama then had dropped him off on the road, telling him to wait.

"Michelle's body was discovered six days later on August 10, 1981, in the Black Meadows Landing dump in

California, some nine miles from where Michael, Jr., was found. The body had many injuries, including a crushing injury to the skull which definitely occurred before death. Depending on the type of brain injury suffered, the child could have lived from two to twenty minutes, but no more.

"There was also a bruise above and to the left of the left eye, caused by pressure from a smooth surface, which occurred while there was good circulation of blood, The collarbone was fractured in two places, and three front ribs were broken and pressed in so that they seriously jeopardized breathing and probably punctured the lungs. A single crushing blow probably caused these injuries, and they happened when the child was alive and had good circulation, before she went into shock. The pathologist had no basis for determining whether the head or the rib injuries came first. Associated with the rib injury was a bruise involving scraping and tearing of the skin from the left nipple to the left armpit; this also occurred before death.

"The left upper arm was fractured near the elbow and nearby there was a bruise. These injuries could have been caused by impact from a blunt object, or by holding the child by the arm and twisting the arm while flinging the body down. They happened before death and

before the child went into shock. In addition, there were many small, irregular scrapes, bruises and tearing of the skin along the left outer forearm, inflicted while there was good circulation and blood pressure, before shock. There was also a large bruise on the left thigh which occurred before death.

"These were the injuries which occurred before death. There was considerable further injury which may or may not have occurred after death. Seven right back ribs and six back left ribs were broken and pressed in. This injury happened at one blow. There was a long incision from the ribs to the groin on a slightly leftward diagonal. It appeared that the uterus had been removed through this opening. There were two small incisions over the left groin. There was an oval incision between the legs; the vagina and anus had been removed. It was impossible to determine conclusively whether there had been any sexual assault.

"Defendant was arrested in Midland, Texas, in mid-August. He had his uncle's truck; it was dirty, dented, and stripped of valuables. In it were a box of blades for a utility knife and a crumpled cowboy hat. There was blood on the front fender, but it could not be determined whether this was human or animal blood. The fabric and seat covers in the truck were examined, and there was no sign of blood or hair on them.

Defendant had bloodstains on his pants, shirt, belt and boots when arrested, but they were not typed or compared to his or the victim's blood.

"Defendant was extradited from Texas to Oregon, where he was housed in a Washington County jail with one Tony Krossman, who had been a paid informant for the Federal Bureau of Investigation, the Drug Enforcement Administration, and various sheriffs' departments. Krossman was under sentence for grand theft, with a five-year probation on conditions that he serve a sentence in jail and that he not act as an informant without the knowledge of the sentencing judge. Krossman testified that defendant told him that he was trying to make bail because he was afraid that warrants would arrive from Arizona and California charging him with kidnapping and murder. Krossman said that defendant told him he had killed someone. The only details Krossman could remember were that defendant said that the crime has happened in Parker or Flagstaff, Arizona, and that the defendant was afraid that a blonde woman had seen him in the course of the crime. When detectives from San Bernardino County interviewed Krossman in the Oregon jail, he initially denied that defendant had said anything to him. He later explained to Oregon officials that his probation condition prevented his cooperation; when the Oregon

officials cleared his cooperation with his sentencing judge, he gave the incriminating statements. Krossman had been released from jail at the time of his testimony, and he had received and expected no benefits from it.

"Two San Bernardino jailhouse informants gave much more detailed statements. Gary Howard[1/] was in an isolation unit in a cell adjoining defendant's in September 1981. He said that he had no access to television, radio or newspapers in the unit, and had heard nothing about defendant's case. Defendant, in their first conversation, told Howard that he was charged with a kidnap murder involving a child. A couple of days later, defendant said that he had trouble sleeping because of the case and needed to talk. He said he had picked up a baby in Arizona and killed her. A few days later, defendant told Howard that he had been going through Arizona and stopped at a bar, where he drank and shot pool with the Melanders. He got friendly with Mrs. Melander, and when he told her he was on his way to Texas but was broke, she said that it he would drive her out to pick up her children, she would give him money for gas. They went and picked up the children, and then went into another bar.

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1. See, People v. Howard, 44 Cal.3d 375, 243 Cal.Rptr. 842, 749 P.2d 279 (1988).

Little Michael, Jr., came in and said someone had stolen a gun out of the glove compartment of defendant's truck. Defendant got upset, and Mrs. Melander suggested going to the police. They went to a sheriff's substation, but defendant decided not to enter it because he remembered that the truck he was in was stolen. He drove off because he was fearful of being discovered with the stolen truck. He drove around not knowing what to do. He had been drinking and shooting Quaalude. He drove out of town, and when the little girl started crying, he slapped her hard enough to break her ribs, but she did not stop crying. He then threw her around in the truck, and she did stop crying. In one conversation he said that when he stopped to relieve himself, Michael ran off. In another conversation defendant said that Michael was still in the car when he stopped and tried to force the baby to orally copulate him. When he could not do this, he cut her belly and cut her private parts out. He then drove to a dump and put her in a plastic bag and threw her out. He said he cut the baby with a hunting knife and left her body near Parker Dam. In another conversation defendant said that he had a companion named Paul who slapped the baby around in the truck, then threw her out at the dump and cut her. He later admitted that there had been no accomplice.

Defendant also said that he was going to 'play a dummy act' to get to Patton State Hospital, and claim he had a split personality and had blacked out. At one point during one of their conversations, defendant said that he kept slashing and sticking the baby, that she kept screaming and yelling, that she looked like hamburger and that he was cutting her with the knife to stop her from crying. In another conversation he said that he had removed the sex organs to obscure the sexual assault and to make it difficult to identify the baby's sex.

"Howard denied that he got any of this information from the press or in the jail. He denied that he received any benefit for his testimony, though it is true that two of the investigating officers and the district attorney in this case testified for him at his penalty trial, which occurred before defendant's trial. He said that he was testifying because he had a little girl and did not like baby murderers. He admitted making a false accusation against someone in a drug offense in the hopes of getting help in his child custody dispute.

"David Hicks, who was in custody pending sentencing on a robbery conviction, and who was still facing trial in a kidnap robbery, testified that in October 1981, defendant found that Hicks was housed

with Howard, and told Hicks that he would give him $500 to kill Howard to prevent Howard's testimony against him. Hicks had no intention of killing Howard, In December, when they were housed together, defendant asked Hicks why he had not killed Howard. Hicks at first said he had no reason to do it, then said if defendant's father would give him $500, he would do it. Defendant then told him about the charged offenses. He said that he had stolen his uncle's truck and had gone to Oregon to see his girlfriend Molly. He found she had another boyfriend, so he slashed the tires and broke the windows on the boyfriend's car and went to Parker, Arizona. He said he was drinking with the Melanders, and that Vickie said that she would give him gas money if he gave her a ride to pick up her children. They picked up the children and stopped at a bar. The boy, Michael, came into the bar and said that a gun had been stolen from the truck. Defendant su3pected Michael Melander, Sr. They went to the police station to report the theft, and Vickie went into the station. Defendant drove off because he was frightened about being in the stolen truck and feared he had warrants outstanding from Oregon. He stopped in the desert to urinate and the boy ran off. He drove to a junkyard. He 'did in' the baby girl. He tried to have sex with her but she was too small so he cut her.

He put her in a plastic bag and threw her body in the junkyard. He went to the dam and buried the knife. He said he had not thrown the knife in the dam, as he had told Howard, Hicks told defendant he should have his father go and recover the knife, but defendant said that this was not possible because he had told his father he was innocent. Hicks offered to have the job done, and defendant told him where he had hidden the knife.

"Hicks denied getting any benefits for his testimony and denied that he had gotten any of the details of the offense from Howard or anywhere but from defendant. He admitted putting on a false insanity defense at his trial. He did not tell the authorities about defendant's statements until just before his own sentencing, in January 1982. He was testifying out of a sense of public duty. He told officers about the location defendant said his had put the knife; the officers did not recover the utility knife handle from that location.

"The investigating officers in the case confirmed that they had offered Howard and Hicks no benefits for their testimony. They also confirmed that the isolation units in which defendant, Hicks and Howard were housed generally had no access to radio, television or newspapers, but confirmed that Howard

could have had access to newspapers during a period in August 1981.

"The defense case consisted of attacks on the credibility of Howard, and defendant's testimony that he had not kidnapped the children nor harmed the child. Police officers and relatives of Howard testified that he had a reputation as a liar and a cheat, and that it was always difficult to sort out what was true from what was false about his statements. Investigators in Howard's own capital case said he had made false accusations against another person with great dramatic flair. Both Howard's estranged wife and a nephew of Howard said that Howard told them that one of the investigating officers had either shown him the body or a photograph of the body of the victim, and he said that it looked like hamburger. Howard also told both that he was cooperating with the police in the hopes of a bargain on his own case. Howard's ex-wife said that he had falsely informed police that she had a large quantity of cocaine for sale.[2/]

"Another witness said that about a week before the kidnapping, she heard Vickie Melander talk about borrowing money from a 'Panama.' Vickie's mother-in-

2. Howard later recanted his trial testimony and said defendant had never made any admissions to him, but had always maintained his innocence. This issue is before us in a petition for writ of habeas corpus, post.

law testified that Vickie did not appear to love her baby girl. The defense also elicited from prosecution witnesses that Vickie Melander was distraught over her cramped living situation on the day of the murder, was fed up with her unemployed husband, had discovered that she was pregnant again, an had asked an acquaintance whom she hardly knew if she could move in with her after she left her husband.

"Defendant testified that on July 31, 1981, his uncle sent him to pick up a roll of carpet. He had an accident which dented the truck, and fearing his uncle's displeasure, he drove off to visit friends. He ended up in Parker, and spent the afternoon in the Silver Saddle bar, as the prosecution witnesses had testified. It was Vickie Melander who gave him the nickname of Panama Red. He denied ever using the name Don Donovan. He took Vickie Melander to pick up her children, and then they stopped at the Turtle Barn bar so Vickie could talk to a friend. Vickie told him that Michael, Jr., had said that someone had stolen defendant's rifle out of the truck. Defendant said he did not become enraged, and that Vickie had not run away from him toward the sheriff's substation. He said that they drove back to the Silver Saddle, and that he would not agree to go to the substation because he was driving a stolen truck. Defendant flirted with the

bartender at the Silver Saddle while Vickie got into an argument with her husband. Vickie then asked defendant to driver her to another bar to talk to friends about finding a place to stay for the night. He could not remember the name of the bar or its exact location. He dropped Vickie and her children off there and then went to PDQ market looking for his gun. He admitted having been upset and telling the store employee that if they had trouble with whoever took the gun, to blow their head off. He then went into a restaurant and talked to a deputy sheriff, who said defendant should report the loss to the police. He then drove off to Texas. He did not clean the pickup truck. He got blood on himself during his arrest in Texas. He did not harm the children and he was not familiar with the area around Parker Dam or with the town of Parker. He did not talk to Tony Krossman about anything except his girlfriend in Oregon, and he followed his attorney's advice and did not talk to anyone in the San Bernardino County jail about his case.

"In rebuttal the prosecution put on evidence that there was no bar in Parker in the area where defendant said he had dropped off Vickie and her children." (People v. Pensinger, supra, 52 Cal.3d at pp. 1229-1236.)

SUMMARY OF RESPONDENT'S ARGUMENTS

After reversing one special circumstance, the California Supreme Court properly weighed the special circumstances and determined death was the appropriate punishment. In evaluating the case, the California Supreme Court did not violate any rule against double jeopardy on collateral estoppel. The court's reference to sexual abuse was not a reference to acts for which petitioner was acquitted, but was instead a proper comment on the evidence.

The testimony of informant Gary Howard was neither perjurious nor so materially untruthful as to have played a role in the jury's verdict.

As testified to by the trial prosecutor during the habeas corpus evidentiary hearing, the report from South Carolina regarding the unfounded allegation that Vickie Melander hid her son was turned over to defense counsel and not withheld by the prosecution. In any event, there was nothing in that report which could have been used to demonstrate Vickie, and not petitioner, had killed baby Michelle.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT PROPERLY AFFIRMED THE PENALTY OF DEATH AFTER REVERSING THE TORTURE SPECIAL CIRCUMSTANCE ON INSTRUCTIONAL GROUNDS

In his first two arguments, Petitioner contends the California Supreme Court erroneously affirmed the penalty of death by failing to engage in a reweighing of the evidence after having reversed the special circumstance of torture on instructional grounds. (Pet., pp. 11-13; 13-18.) For purposes of clarity these two contentions will be refuted in one argument. First, there will be focus on the three decisions of this Court upon which Petitioner relies. Then there will be an examination of what the California Supreme Court did when it affirmed the judgment. In proceeding in this way it will become clear the California Supreme Court properly affirmed the penalty of death.

This Court's Decisions

Petitioner relies on a number of recent decisions of this Court to contend the California Supreme Court was required, and failed, to reweigh the aggravating factors against the mitigating factors before affirming the death penalty. In Maynard v. Cartwright, 486 U.S. 356 (1988) this Court was faced with an Oklahoma statute which permitted the imposition of the death penalty if the jury found the murder was "'especially heinous, atrocious, or cruel.'" (Id., at p. 359.) After the Tenth Circuit had determined the language to be unconstitutionally vague, this Court granted certiorari. This

Court affirmed the ruling of the Tenth Circuit, finding that the Eighth Amendment required that juries be adequately informed as to the basis on which the death penalty can be imposed, so as to prevent open-ended discretion. (Maynard v. Cartwright, supra, 486 U.S. at pp. 361-362.)

Interestingly, in analogizing this case to Godfrey v. Georgia, 446 U.S. 420 (1980) this Court noted the failure of the Georgia Supreme Court in Godfrey to find whether the evidence supported the conclusion there was torture involved. (Id., at pp. 362-362.) The state in Maynard v. Cartwright had objected to what it perceived as the Court of Appeals ruling that there must be torture or other serious physical abuse in construing the language of the statute. While this Court did not hold such torture or abuse "is the only limiting construction of [the statutory language] that would be constitutionally acceptable," it clearly indicated a factual finding in that regard would be one means of satisfying the Eighth Amendment standard.[3/]

In Clemons v. Misssissippi, 494 U.S. ____, 108 L.Ed.2d 725, 110 S.Ct. ____ (1990), this Court again examined the validity of imposing the death penalty when one of the aggravants found by the jury was that the murder was "'especially heinous, atrocious or cruel.'" Despite the Maynard v. Cartwright

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3. As concerns the notion of reweighing the evidence after the reversing of a special circumstance, it was noted that the old practice in Oklahoma had not been to "save" the death penalty when one such aggravating factor was found invalid or unsupported. Although that practice had changed by the time the this Court reviewed the case, it had not been available at the time the Tenth Circuit made its review.

decision, the Mississippi Supreme Court had upheld the conviction on the grounds that Mississippi had an established procedure for saving a death penalty when one aggravating factor was found invalid or unsupported, had already given the language of the statute a constitutionally limiting construction, and the jury had been instructed death was not required even in the absence of mitigation. (108 L.Ed.2d at p. 735.)

Initially, this Court noted nothing in the Sixth Amendment would indicate an accused's right to a jury trial was infringed upon by permitting an appellate court from affirming a death penalty despite the invalidation of one or more aggravating factors if it decides the remaining aggravants outweigh the mitigating factors. (Id., at p. 736.) In appreciating the fact that appellate courts can weigh aggravating factors against mitigating factors to produce a "'measured consistent application'" of the death penalty, the Court opined,

> "it is also important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes. [Citations omitted.] Therefore, we conclude that state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." (Id., at pp. 738-739.)

Thus, the reason this Court vacated the decision of the Mississippi Supreme Court and remanded for further proceedings was the ambiguity of state court's decision in indicating whether there had been a weighing function by either disregarding the application of the "especially heinous" factor or by evaluating it according to the narrow interpretation required by this Court. Indeed, this Court seemed concerned about Mississippi court had noting the presence of brutal and torturous facts on the one hand, and the indication by the state court that it had not considered that factor at all. (Clemons v. Misssissippi, supra, 108 L.Ed.2d at p. 740.) What this Court sought to protect against was a court rule "authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance." (Ibid.) Such an automatic rule would result in a failure to provide the defendant with the particularized consideration mandated by the Eighth Amendment. (Ibid.) This Court did caution, however, that reweighing or harmless error analysis is not mandated, just constitutionally permissible. (Id., at p. 742.)

Parker v. Dugger, 498 U.S. ___, 112 L.Ed.2d 812, 111 S.Ct.___, (1991) presents another variation to the theme of appellate court review of capital cases where there are mitigating and aggravating factors present. In Parker, the petitioner was convicted of two first degree murders and a third degree murder. The jury, which renders advisory sentencing decisions in Florida, concluded that although there were

sufficient aggravating factors to warrant the death sentence, Petitioner had presented mitigation which outweighed the aggravation, and, therefore, recommended petitioner receive life imprisonment on both counts. (Parker v. Dugger, supra, 112 L.Ed. 2d at p. 819.) The trial judge, however, overrode the jury's recommendation on one of the counts and imposed the death penalty. In so doing, the judge found there were no statutory mitigating circumstances and no mitigating circumstances which outweighed the aggravating circumstances. The Florida Supreme Court found that although there was insufficient evidence to support two of the six aggravating factors, because there were no mitigating factors found to balance against the remaining aggravants the sentence was affirmed.

The United States District Court for the Middle District of Florida reversed on the grounds the judge failed to find the nonstatutory mitigating circumstances which were supported by the record. The Eleventh Circuit Court of Appeals on the other hand, reversed the District Court by interpreting the record as the judge finding the mitigation had been outweighed by the aggravation. (Id., at pp. 820-821.)

In applying the Florida statute, this Court recognized that although the jury is advisory, once it recommends a life sentence it may only be overridden when "'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'" (Id., at p. 821, citing Tedder v. State, 322 So.2d 908 (Fla 1975).) Recognizing that while an

appellate court did not have to remand when one or more aggravating circumstances is reversed, but could reweigh the evidence or conduct a harmless error analysis, this Court concluded the Florida Supreme Court had ignored the evidence and misconstrued the record. (Parker v. Dugger, supra, 112 L.Ed.2d at p. 825.) In essence, the Florida Supreme Court had considered the matter of punishment without considering the evidence of mitigation which was obvious from the record. (Id., at p. 827.) By ignoring that evidence the state court had denied petitioner the individualized consideration to which he was entitled. (Ibid.)

The California Supreme Court Decision

Despite Petitioner's characterizations, there is no analogy between the California Supreme Court decision in People v. Pensinger, supra, and those cases referred to above. In its original opinion the California Supreme Court found there was sufficient evidence to support a finding of first degree murder, as well as sufficient evidence "from which a reasonable jury could conclude that defendant killed with the intent to torture." (People v. Pensinger, supra, 52 Cal.3d 1210, 1238.) In considering the special circumstance of torture-murder the court found the jury was not instructed it had to find petitioner intended to inflict torture. While the evidence was sufficient to sustain a finding of first degree torture murder, the court concluded evidence of petitioner's intent to inflict torture was not overwhelming. Thus, the error was not said to be harmless,

and the special circumstance was reversed. (People v. Pensinger, supra, 52 Cal.3d at p. 1255.)

In its modified opinion -- People v. Pensinger, 53 Cal.3d 729a (1991) -- the court, in a section entitled "Effect of Invalid Special Circumstance," stated the following:

> "Defendant contends that the reversal of the torture-murder special circumstance finding requires reversal of the penalty judgment despite our affirmance of the kidnap-murder special circumstance finding. We disagree. As we have said before: 'The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors [citation], and this court is in accord.' (People v. Sanders (1990) 51 Cal.3d 471, 520 [273 Cal.Rptr. 537, 797 P.2d 561].) Although instructional error requires reversal of the torture-murder special circumstance finding, the evidence of the shocking nature of the attack on the infant victim was properly before the jury. The erroneous special circumstance finding was only a 'statutory label' which could not have affected the verdict in light of the evidence before the jury. (See People v. Wade, (1988) 44 Cal.3d 975, 998 [244 Cal.Rptr. 905, 750 P.2d 794].)"

The significance of the court's language is its reference to People v. Wade and People v. Sanders, two decisions in which there was a reversal of a heinous, atrocious, cruel

special circumstance, but an affirming of the death penalty. In each case, reference was made to this Court's opinion in Zant v. Stephens, 462 U.S. 862 (1983). In Zant, this Court noted the inconsequential effect on the jury of an aggravating circumstance improperly designated with a "statutory label." The court in People v. Wade, supra, stated "the only effect the heinous-murder finding could have had on the jury was thus merely a consequence of the statutory label 'special circumstance.'" (44 Cal.3d at p. 998.)

This, then, is the real connection between Wade and Pensinger. While the California Supreme Court felt compelled to reverse the special circumstance of torture-murder, the court made a special point of indicating that the evidence was sufficient to support such a finding, and the reversal of the special circumstance did nothing to keep the manner of the killing from the jury. It was the manner of the killing, not the statutory label attached to it which warranted the death penalty.

In this regard, the California Supreme Court did, indeed, make an analysis of the evidence. As this Court said in Clemons v. Mississippi, supra, the state court may make harmless error analysis or evaluate the evidence without considering the invalidated special circumstance. (108 L.Ed.2d at p. 740.) The court here took the latter approach, finding the evidence of the killing was still before the trier of fact, regardless of the statutory label attached. On this basis there was sufficient evidence on which to sustain the death penalty. There was, then,

nothing automatic about the decision about the unanimous decision of the California Supreme Court[4/] and Petitioner received the particularized, individual consideration mandated by the Eighth Amendment.[5/]

II

THE CALIFORNIA SUPREME COURT'S REFERENCE TO THE SEXUAL ACTS COMMITTED ON THE VICTIM DID NOT VIOLATE PRINCIPLES AGAINST DOUBLE JEOPARDY OR COLLATERAL ESTOPPEL

Petitioner next alleges the California Supreme Court violated principles of collateral estoppel and double jeopardy by making reference to the fact the victim was sexually abused when the jury had acquitted petitioner of committing the murder during the commission of a lewd act or during the commission of oral copulation. (Pet., pp. 19-24.) Petitioner has misapplied the language of the California Supreme Court's opinion in order to make it fit his desired conclusion. The reference by the court to the sexual abuse sustained by the victim did not refer to the charges for which petitioner was acquitted.

That petitioner's argument is off base can be seen from the issues involved in the various cases cited by petitioner. In Arizona v. Rumsey, 467 U.S. 203 (1984), this Court was faced with the question whether it was a violation of the double jeopardy

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4. The concurring opinion by Justice Mosk did not concern the imposition of the death penalty.

5. That the California Supreme Court was aware of the mitigating factors presented to the jury is evident from the recitation of the facts involved in the various issues. (See People v. Pensinger, supra, 52 Cal.3d at 1258, 1264.)

clause to permit the state of Arizona to sentence petitioner to death after the life sentence he had originally received was set aside on appeal. (Arizona v. Rumsey, supra, 467 U.S. at p. 205.) In United States v. Martin Linen Supply Co., 430 U.S. 566 (1977), the issue was whether a judgment of acquittal under Federal Rule of Criminal Procedure 29(c) was an appealable order. (Id., at p. 567.) In Smalis v. Pennsylvania, 476 U.S. 140 (1986), the issue was whether the sustaining of a demurrer on grounds that the evidence presented was insufficient precluded the prosecution from appealing. (Id., at p. 141.)

Contrary to petitioner's characterization, the language of the California Supreme Court did not constitute a reevaluation of a charge for which petitioner was acquitted. What the court did was assess the evidence and sustain the verdict by finding there was ample evidence to warrant a first degree murder result. After recognizing the jury had rejected the theory of felony-murder by acquitting petitioner of the charges of a lewd act and of oral copulation, the court concluded there was evidence to sustain the first degree finding on two other theories: premeditated, deliberate killing, and murder by means of torture.

In analyzing the first theory, the court examined the evidence of planning. In so doing, the court remarked "there was evidence that at some point [petitioner] also sexually abused the body." (People v. Pensinger, supra, 52 Cal.3d at p. 1237.) Petitioner asks this Court construe this remark to be a reference to be to the acquitted charges. In point of fact, however, that

reference could only be to the uncontradicted evidence that the infant victim had her genitalia removed with a knife. Had the court intended a reference to the acquitted charges it would have specifically referred to intercourse or oral copulation. It chose not to do so. There was no conflict as to the nature of the wounds suffered by the victim. The cutting of the genitalia certainly constituted sexual abuse. Thus, there was no double jeopardy implication by the language of the court.

Petitioner also finds fault with the court's reference to motive as including petitioner's expressed desire to engage in intercourse with the infant. (See People v. Pensinger, supra, 52 Cal.3d at p. 1238.) In considering the evidence of motive the court was reciting the two bases which had been presented to the jury. The first basis of motive was said to be the "incomprehensible need for revenge over the theft of the rifle." The second basis was "evidence of [petitioner's] conduct before the killing which suggested that [petitioner] killed the child in order to have sexual intercourse with her." At no point in the court's opinion did it suggest there had been a finding such acts had occurred, only that the jury had "some" evidence of motive before it. (Ibid.) Despite their acquittal of petitioner on the precise charges underscoring the sexual conduct with the infant, the jury could very well have concluded that was a motive in the killing. Certainly, the court was free to acknowledge the presentation of that evidence even in light of the acquittals.

By so doing, the court in no measure reassessed the decision of the jury contrary to the double jeopardy clause.

The California Supreme Court was obligated to review the evidence presented to the jury to determine whether there was sufficient evidence to sustain a first degree murder verdict. The relating of the evidence available to the jury in making their decision in no measure constituted a violation of double jeopardy, for in no manner has petitioner been retried for an offense of which he was acquitted or for which he received a lighter sentence.[6/]

III

THE INFORMER'S TESTIMONY WAS NOT PERJURIOUS AND, IN ANY EVENT, PLAYED NO PART IN PETITIONER'S CONVICTION

Waving the red flag of perjury, petitioner raises two arguments suggesting his conviction need be reversed. It is first argued, perjured testimony was used to obtain petitioner's conviction, thereby depriving him of a fair trial. (Pet., pp. 26-28.) Next, petitioner argues the California Supreme Court employed the wrong standard in testing for prejudice. (Pet., pp. 29-30.) When the trial testimony of the informer, Gary Howard, is examined it is clear there was no perjury. Even assuming, as the California Supreme Court said, the false impression that Howard sought nothing in return for his testimony should have

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6. Petitioner's brief Argument IV refers to the Eighth Amendment and the due process clause as barring the California Supreme Court from using facts resolved in Petitioner's favor against him (Pet., p. 25). This contention has already been answered in Respondent's Argument II and will not be repeated.

been cleared up by the prosecution, it is clear beyond all doubt that aspect of Howard's testimony played no role in Petitioner's conviction.[7]

The Trial Testimony

At petitioner's trial death row inmate Gary Howard testified petitioner had admitted killing the infant. (RT 2970-2984.) During his extensive cross-examination of Howard, defense counsel explored the possible motives Howard had for testifying. One such motive was Howard's seeking assistance from the prosecution for his case. In this regard, the question about which Petitioner complains was asked:

"Q: Okay. By September did you believe that it might be helpful to you to assist the District Attorney and the Sheriff by being an informer?

"A: No, sir.

"Q: You had no belief or expectation for that?

"A: I didn't want nothin. Didn't ask for nothing.

"Q: Did you think you might be able to get a plea bargain as a result of the cooperation?

"A: No, sir." (RT 2990-2991.)

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7. The reference order of the California Supreme Court, at the time the evidentiary hearing in state court was granted, asked, inter alia, "did the prosecution fail to disclose material exculpatory evidence that the police or prosecutor had promised witnesses Howard and/or Hicks leniency or other benefits in return for their testimony?" The question of whether Howard perjured himself only arose during the consideration of Howard's attempt at recanting his testimony about petitioner confessing to the murder.

Thereafter, defense counsel brought out the fact Deputy Stalnaker, Sergeant Lake and Deputy District Attorney Haight had all testified at Howard's penalty phase which nonetheless resulted in his getting the death penalty. (RT 2991.) Thus, no part of that questioning of Howard pertained specifically to his asking for custody help immediately prior to his testifying at trial.

Later during cross-examination, Howard was asked in general terms what he expected in return for acting as an informer. Howard's reply was "justice." (RT 3089.) Immediately, defense counsel seized upon this answer to ask Howard whether he had a conversation in 1981 with a detective Poland to whom he related informing for the sheriffs' department in Los Angeles and Riverside. When counsel asked Howard if he were trying to get custody of his children at that time, Howard denied it but acknowledged he was trying to get visitation. (RT 3090.) To suggest, therefore, that perjured testimony regarding Howard's motivation for testifying was presented to the jury is incorrect.

Moreover, even assuming Howard created a misimpression there is no question the jury was given every reason not to believe him. Not only did defense counsel extensively cross-examine Howard, the prosecutor, contrary to petitioner's representation, did inform the jury that it was very hard to believe somebody like Howard. During his closing argument to the jury Deputy District Attorney Haight told the jury,

"We made it clear to him, he was getting nothing for this and he, if he expected anything, he was dreaming . . . We used to joke about it during the case, how we beat it into his head.

"He's doing it for whatever reason. The guy -- I won't even try to guess at what it is." (RT 3848-3849.)

In responding to the defense suggestion that the prosecution had concocted the confession with Howard, the prosecutor told the jury

". . . as I said all along, there's no reason in his background or his character why you should believe anything he said." (RT 3851.)

Shortly thereafter, the prosecutor again told the jury

"And I agree, I agree probably more than [defense counsel], boy, you should look at somebody like Gary Howard so hard and so distrustful before you believe him. It should be looked at very carefully." (RT 3852.)

Lastly, the prosecutor told the jury that as far as character was concerned, Howard was right up there with petitioner. (RT 3855.) The reality is Howard was never portrayed as anything other than what he was, a convicted murderer sitting on death row along with petitioner.[8/]

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8. Petitioner's representation the prosecutor characterized Howard as courageous and that his motives were "'fathomless,'" finds no support in the record. To the contrary, what the

Concededly, the California Supreme Court did conclude "that the prosecution should have corrected the false impression created . . . by disclosing that Howard had unsuccessfully attempted to extort a last-minute advantage in return for his testimony," (People v. Pensinger, supra, 52 Cal.3d at p. 1273.) As the court noted, however, not only was there no masking of any inducement, the defense fully exploited the motivation which did exist for Howard's testimony; the gaining of law enforcement testimony at Howard's trial. Secondarily, defense counsel also explored Howard's request for custody assistance, which Howard admitted to the extent of asking for visitation. The Supreme Court also referred to the prosecutor's comments during closing argument. (Ibid.)

Assessing these factors, the California Supreme Court concluded any error was harmless. Petitioner assigns error to this conclusion by arguing the court applied the wrong harmless error test. The table on which petitioner's argument rests has no legs.

Arguing a new trial is required when "the false testimony could 'in any reasonable likelihood have affected the judgment of the jury'" (Giglio v. United States, 405 U.S. 150, 153-154 (1972)), petitioner contends the failure to reveal Howard's unsuccessful attempt at securing a benefit is just such

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prosecutor said was he agreed with defense counsel "in one sense, that his motives are just unfathomable," and thereafter reiterated the fact Howard was unequivocally told he would receive nothing for his testimony. (See RT 3848.)

evidence. While there can be no denying Howard was an important witness, the failure to relate a last ditch, unsuccessful effort at garnering a quid pro quo could have had no effect on the jury since Howard testified in the absence of such benefit. Indeed, revealing Howard's request in this context rather than as part of history of being a "snitch" might very well worked against petitioner's interests by convincing the jury Howard's motives were "pure."

In any event, the Supreme Court did make the appropriate weighing analysis when it referred to the various factors related above. Under these circumstances it was said the error was harmless. There is simply no conceivable way the verdict was affected by not knowing Howard had requested a favor, had been refused, but had testified anyway.

IV

REGARDLESS OF WHEN PETITIONER RECEIVED THE SOUTH CAROLINA REPORT, THERE IS NOTHING CONTAINED THEREIN WHICH WAS MATERIAL OR WHICH WOULD HAVE REASONABLY CONTRIBUTED TO THE JURY'S VERDICT

As he did in his Petition for Writ of Habeas Corpus filed in the California Supreme Court, petitioner lastly contends his conviction should be reversed on the rationale of Brady v. Maryland, 373 U.S. 85 (1963), Giglio v. United States, supra, 405 U.S. 150, and United States v. Bagley, 473 U.S. 667 (1985). Petitioner asserts this trilogy of cases is applicable as a result of petitioner not being aware of his having received a report from South Carolina until the post-conviction evidentiary

hearing ordered by the California Supreme Court. Respondent submits, first, the facts adduced at the habeas corpus evidentiary hearing indicate petitioner had received the report as part of the documentation turned over from defense counsel. (RTEH Vol. 8, pp. 620-621.)[9/] In any event, respondent submits petitioner has failed to demonstrate the information contained in the report was material, as required by the Brady-Giglio-Bagley line of cases.

The report about which petitioner complains reveals an allegation of child abuse was made against Vickie Melander by a neighbor, Margie Huggins, who claimed the Melanders went to neighborhood bars and got drunk, and that Vickie had hit Michael in the head with a pair of pliers. Huggins, who claimed the Melanders were "trying to keep up" with the Huggins, also said Vickie would tape Michael's mouth shut with tape when he became rowdy. (Pet's Exh. B, p. 4.)

The investigation documented in the report yielded nothing in the way of substantiation. In fact, the detailed report concludes "the worker is going to unsubstantiate this case as of this date." In reaching this conclusion, the worker noted Vickie Melanders' complete denial of the allegations about hitting Michael and taking him to bars. This denial was corroborated by the Melanders' babysitter, who also had no knowledge of any bump on Michael's head. Others contacted during

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9. "RTEH" refers to the evidentiary hearing held on Petitioner's Petition for Habeas Corpus.

the investigation included the owner of a local bar who opined the Melanders' were good parents who did not neglect their children to go to the bar. The manager of the trailer park in which the Melanders lived also felt the Melanders were good parents who appropriately disciplined Michael.

The social worker concluded:

"No substantiating data can be found as to the allegations. The home is clean, the relationship between the mother and the child and the father and the child seems to be good. The child seems unafraid and does not seem to be excessively loud and rowdy and trying to get attention either. Worker has seen no marks or bruises of any kind on the child. With the exception of the neighbor across the way who made the original complaint, a worker can find **no neighbors or friends who find anything undue in the way these people conduct their lives**." (Pet'r Exh. B, p. 7, emphasis added.)

The social worker did note the poor financial condition of the Melanders and the fact they needed public assistance from the Salvation Army to help pay the rent and the electric bill. It was also noted Vickie was dismayed over being pregnant because of the difficulty they already had in paying bills. In this context, the social worker brought up the idea about putting the baby up for adoption. While Vickie said that would be something

to consider, she also felt her husband would not consider it. At no time did the report even imply Vickie did not want the baby.

The report, then, reveals nothing more than an unsubstantiated claim of misconduct against the surviving child, and an unplanned pregnancy. Despite this, petitioner claims under the rubric of Brady, Giglio, and Bagley that the failure to receive this report during trial constituted suppression of evidence by the prosecution and mandates a reversal of his conviction. Such a conclusion is totally unwarranted.

In Brady v. Maryland, supra, 373 U.S. 83, a statement by defendant's co-defendant in which he admitted the actual killing was withheld by the prosecution despite a specific request by counsel for defendant for all such statements. (Id., at p. 84.) In affirming a lower court remand for a trial on the issue of punishment only, this Court concluded:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Id., at p. 87.)

In Giglio v. United States, supra, 405 U.S. 31, the court was faced with a situation where the prosecution failed to inform the defendant his co-conspirator, and the only witness linking defendant with the crime, had been told he would not be prosecuted if he testified against defendant at the grand jury

and at trial. (Id., at p. 152.) Relying on Brady, this Court concluded a new trial was warranted when "'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" (Id., at p. 154, citing Napue v. Illinois, 360 U.S. 264, 271 (1959).) In light of the government's case resting almost entirely on the testimony of that witness, and the effect such disclosure could have had on the jury's assessment of the witness' credibility, a reversal was mandated. (Giglio v. United States, supra, 405 U.S. at pp. 154-155.)

This Court's most recent clarification of this area came in the case of United States v. Bagley, supra, 473 U.S. 667. There, in response to defendant's request for information about any promises, deals, or inducements made to any government witness, the prosecution failed to inform defendant two principal witnesses had been contracted to receive monetary payments from the Federal Bureau of Alcohol, Tobacco, and Firearms in return for information obtained against the defendant. (Id., at pp. 671-672.)

This Court found the fact the evidence withheld pertained to impeachment to be of no consequence. Impeachment evidence, too, was governed by the principles of Brady. (Id., at pp. 676-677.) By the same token, this Court acknowledged a conviction will be reversed only when "the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (Id., at p. 678.) Thus, the standard of

materiality was deemed to be whether there was a reasonable probability that had the suppressed evidence been disclosed the result of the trial would have been different. (Id., at p. 684.)

Initially, there has been no showing made that the report was ever withheld. No discovery number appears on the document, indicating the prosecutor had never personally inventoried it. Instead, it would appear the report was part of the sheriff's file which had been first given to defense counsel Friedman, and then had been tendered to appellate counsel Natali. (RTEH, Vol. 8, pp. 620-621.)

Even assuming Petitioner can get beyond this threshold consideration, the fact remains the information was not material within the definition of the Bagley court. Petitioner's characterizations notwithstanding, the fact remains the report details what was an unsubstantiated claim of child abuse. The complaining witness was a neighbor who might very well have had a grudge against the Melanders, judging from her comment about them trying to keep up with the Huggins when it came to drinking. Conceivably, alcohol played a part in her judgment as well.

In any event, there was nothing in the record to substantiate the claim Vickie Melander first hit Michael. Nothing in the report suggests Vickie had a motive to conceal this investigation in this case, nor is there anything approaching Petitioner's suggestion there was a "pattern of child abuse" (Pet., p. 32.) Merely citing to California Evidence Code section 780 subdivision (f) does not make the report admissible

and, when, as here, there is nothing but unfounded accusations, it is hard to imagine a trial court permitting the admission of such evidence. Likewise, contrary to petitioner's assertions, nothing in the report indicates Vickie committed any child abuse, did not want to be pregnant, and was in the habit of getting drunk and ignoring Michael's welfare.

Even assuming the hearsay accusations of Ms. Huggins were admissible despite their likely exclusion under California Evidence Code section 352,[10] the fact remains Ms. Huggins was entirely discredited. The trial would have become one in which the prosecution would have called all the witnesses referred to in the report to dispel the Huggins claim. Under these circumstances, to suggest the information contained in the report could have undermined confidence in the verdict is sheer folly.[11]

The evidence addressed by this Court in Brady, Giglio, and Bagley is simply not that represented by the report herein. The prosecutor had no part in the preparation of the report. There has been no showing the report was at any time withheld.

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10. Section 352 reads as follows:

> "The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

11. Aside from the lack of information in the report, the evidence at trial included petitioner's incriminating statements to others (RT 2864-2880; 2974-2983; 3142-3144; 3168), as well as the identification of petitioner by name by Michael as being the man who drove off with his sister. (RT 2592-2594; 2616-2625; 2640-2647.)

Lastly, there has been absolutely no showing the report was in any way admissible or material. Had the report been admitted at petitioner's trial, there is no reasonable probability the jury's decision would have been different. (United States v. Bagley, supra, 473 U.S. at p. 684.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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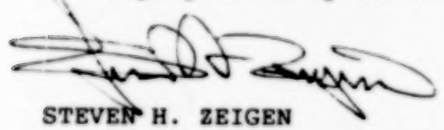

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BRETT PATRICK PENSINGER,

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v.

THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and nine (9) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 17th day of September, 1991.

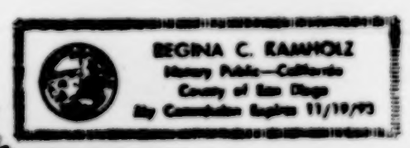
There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 17, 1991.

ANNE MARIE BUFORD

Subscribed and sworn to before me
this 17th day of September, 1991.



Notary Public in and for said County and State